In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 215

NORMAN H. WEAVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1966. The petition for a writ of certiorari was filed on June 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to establish fraudulent intent.

STATUTES INVOLVED

18 U.S.C. 657 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with * * * any small business investment company * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

18 U.S.C. 1006 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with * * * any small business investment company * * * with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a non-jury trial (see R. 8)[1] in the United States District Court for the Northern District of

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[1] Record references are to the "Defendant's Appendix" below.

Illinois, petitioner was convicted on six counts (III, IV, XIV-XVI, and XXI) of a 21-count indictment (R. 12).[2] Counts III and IV charged violations of 18 U.S.C. 657 and 1006 based on the misapplication of $20,000 of the funds of Midwest Capital Corporation (Pet. 3-4). Counts XIV-XVI charged misapplication of more than $900,000 of the funds of the First State Bank of Westmont and false entries in connection with this misapplication, and Count XXI charged conspiracy to commit the substantive offenses (R. 26-29, 34-38). Petitioner was sentenced to imprisonment for one year on each of the six counts, the terms to run concurrently (R. 12). In affirming, the court of appeals limited its consideration to Counts III and IV.

The evidence relating to these counts showed that Lawrence Stickell purchased a controlling interest in the Midwest Capital Corporation, a Small Business Investment company chartered by the Small Business Administration, in July 1962 (R. 57-58), and elected himself, Lester Brock and petitioner directors (R. 59-62). In December 1962 petitioner, acting through Stickell, arranged to purchase a controlling interest in the First State Bank of Westmont. The agreement provided that $20,000 of the purchase price was to be paid on December 19, 1962. (R. 65-69.) On that day, in the Chicago office of Midwest, petitioner, Stickell

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[2] Petitioner was not named in the remaining 15 counts of the indictment. Petitioner's co-defendants, Laurence Stickell and Lester Brock, who were named in those counts, entered pleas of guilty prior to trial and testified for the government (R. 7).

and Brock discussed the availability of this amount. Petitioner indicated that he could not obtain the funds that day but could do so subsequently, and Stickell suggested that Midwest lend him the amount. Petitioner agreed that this would be a satisfactory arrangement if done for a period of only a few days. (R. 70-71, 236-237.) Petitioner then gave Brock his personal check, made out to Midwest, for $20,000. A check in this amount was issued by Midwest and used to procure a cashier's check payable to the sellers of the Westmont bank. (R. 237.) Petitioner and Stickell delivered the cashier's check that evening to the payees (R. 73). It was this loan by Midwest to petitioner to enable him to purchase the Westmont bank's stock that formed the basis of Counts III and IV.

Either that night or the next morning petitioner suggested to Stickell that a loan in the amount of $20,000 to $35,000 be made by Midwest to the Grand Improvement Company, a corporation controlled by petitioner (R. 74-76). About two weeks later, when Brock asked petitioner about his personal check, petitioner replied that he had discussed the possibility of a loan with Stickell. Petitioner instructed Brock not to deposit the check. (R. 76, 243.) The check was subsequently returned to petitioner (R. 243).

In the middle of January 1963, Brock, while preparing a report on Midwest for the Small Business Administration, called Stickell's attention to withdrawals from Midwest's funds which could not be accounted for or which appeared to be unreasonable. Stickell suggested that the items could be taken care

of by entries reflecting a loan to the Grand Improvment Company (a Company controlled by petitioner) in the amount of $12,000, and that he would ask petitioner's permission to do so. He also indicated that the $20,000 check written for the purchase of the Westmont stock would be shown as a loan to Grand Improvement. Subsequently, petitioner acknowledged to Brock that he had discussed with Stickell the matter of the "covering" loan. (R. 241-243.)

On January 29, 1963, another $20,000 check was drawn on Midwest funds, converted into cashier's checks, and applied to the account of State Street Securities, a corporation organized by petitioner and Stickell, and to Stickell's personal account (R. 84-89; 243-245). Stickell indicated that this expenditure would be described as another $20,000 loan to Grand Improvement and would be covered in the same note with the prior disbursements of $20,000 and $12,000 (R. 244).

In late January or early February a loan to Grand Improvement, in the amount of $52,000, was set up on the books of Midwest by Brock (R. 247-248). The loan application and agreement were dated November 15, 1962, although they had not in fact been prepared or executed prior to late January 1963. They described contemplated disbursements of $12,000 on November 15, 1962, and $20,000 on December 19, 1962, and January 29, 1963. Petitioner instructed Brock to bring the papers to his Galesburg automobile sales office where petitioner had an employee, Ted Mellican, sign them as president of Grand Improve-

ment. (R. 77-80; 245-247; 431-450.) Mellican had never been an officer of Grand Improvement, and neither he nor Grand Improvement received any money from Midwest (R. 295-296).

ARGUMENT

It is clear that petitioner committed a crime in receiving a loan from a Small Business Investment company of which he was a director if he acted with fraudulent intent. His argument that the evidence of such intent was insufficient is without merit and presents no issue warranting review by this Court. The total circumstances of the transaction, recounted in the Statement, *supra*, warranted the inference of fraudulent intent drawn by the trial court. As early as December 19 or 20, 1962, petitioner had broached with Stickell the subject of disguising the loan to him as a loan to Grand Improvement. This and subsequent events showed that petitioner from the outset envisaged the concealment of the improper personal loan to himself under the cloak of a fictitious loan agreement with Grand Improvement. On these facts, a finding of fraudulent intent was justified. See *Hargreaves* v. *United States*, 75 F. 2d 68, 72 (C.A. 9); *Cravens* v. *United States*, 62 F. 2d 261, 277 (C.A. 8), certiorari denied, 289 U.S. 733; cf. *Agnew* v. *United States*, 165 U.S. 36. As the court of appeals noted (Pet. App. 24), it was not necessary to show that Midwest suffered actual loss as a result of petitioner's misapplication of its funds. See *Golden* v. *United States*, 318 F. 2d 357 (C.A. 1); *Robinson* v.

United States, 30 F. 2d 25 (C.A. 6); *Hargreaves* v. *United States*, *supra*.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1966.

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[3] Since concurrent sentences were imposed, the court of appeals found it unnecessary to consider the other counts on which petitioner was convicted. However, there is little doubt that petitioner was properly convicted on them as well, and hence that the judgment of the district court is valid irrespective of Counts III and IV. The scheme by which petitioner, Brock, and Stickell wrongfully disbursed some $957,000 of the Westmont bank funds, in an attempt to obtain control of the Crest Finance Company, is set out in detail in the opinion of the State appellate court in related civil litigation. See *Crest Finance Company, Inc.* v. *First State Bank of Westmont*, 66 Ill. App. 2d 364, 214 N.E. 2d 526. The evidence developed at petitioner's trial left no doubt of his full participation, as chairman of the board of directors of the Westmont bank, in this scheme. He was consulted repeatedly and gave his approval as to negotiations (see R. 99, 102-104, 107, 111-113, 114). He authorized the cashier of the bank to make its funds available (R. 107, 109) and he sought and received part of the funds to his personal use (R. 120-121, 262-263).

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